IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 4TH SEPTEMBER 2007 / 13TH BHADRA 1929

SA.No. 916 of 1994(A)

AS.126/1987 of I ADDL.SUB COURT,THIRUVANANTHAPURAM
OS.407/1985 of MUNSIFF'S COURT,NEYYATTINKARA
.....

APPELLANT: APPELLANT/PLAINTIFF

KOCHAPPI NADAR RAGHAVAN NADAR,
POONKOTTU KOLACHIRA PUTHEN VEEDU
MALAYINKIZHU DESOM, MARUKIL VILLAGE.

BY ADV. SRI.ABRAHAM MATHEW (VETTOOR)
SMT.A.A.GEETHA

RESPONDENTS: RESPONDENTS /DEFENDANTS
---
1. KERALA STATE, REPRESENTED BY DISTRICT COLLECTOR, TRIVANDRUM.

2. ASSISTANT DIRECTOR, RE-SURVEY, NEYYATTINKARA.
3. KAMALASANA PANICKER, COMMITTEE PRESIDENT CHARMASASTHA TEMPLE, KUTTICAUD, MALAYINKIL.

4. V.KRISHNAN NAIR, JYOTHY BHAVAN, MALAYINKIL DESOM, SECRETARY, DHARMASASTHA TEMPLE KUTTICAUD, MALAYINKIL.

5. ANANDAN KUTTAN, KUTTICAUD MELE VEEDU DO. DESOM, COMMITTEE MEMBER - DO-
6. KUTTAN MOHANAN OF -DO-
7. KUNJAN SASI OF - DO-
8. VISWAMBARAN, S/O.SARASWATHY OF -DO-

BY GOVERNMENT PLEADER SMT.LATHA THANKAPPAN FOR R1 & R2

SRI. M.RAJASEKHARAN NAYAR FOR R3 TO R5 & R8

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 04/09/2007 ALONG WITH S.A.917/94 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

ORDER ON C.M.P.No.2052/1994 in S.A.NO.916/1994

4.9.2007 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S to Judge

M.SASIDHARAN NAMBIAR,J.

==========

S.A. NO. 916 & 917 OF 1994

==========

Dated this the 4th day of September, 2007

JUDGMENT

Appellant is the plaintiff in O.S.581/1983 as well as O.S.407/1985 on the file of Munsiff Court, Neyyattinkara. Respondents are the defendants. Plaint schedule property in O.S.581/1983 is described in survey No.173/2D which is shown as part of Kolachira Kizhakkumkara purayidom and described as part of 3 acres 36 ½ cents in Ext.A6 partition deed and 3.94 acres in settlement register, but having an extent of 50 cents. It is the C schedule property in the plaint O.S.407/1985. O.S.583/1983 was filed on 6.8.1993 seeking a decree for permanent prohibitory injunction contending that respondents have no manner of right or possession over the property and they are attempting to trespass into the property and therefore they are to be restrained by a perpectual injunction. Subsequently plaint was amended

seeking a decree for declaration of their right and possession to the plaint schedule property and for a mandatory injunction directing respondents to demolish plaint B schedule building constructed in the plaint schedule property allegedly after 23.2.1984. O.S.407/1985 was subsequently instituted on 9.8.1985 seeking a decree for declaration of the right of the appellant to the plaint C schedule property and for a declaration that the order of the third respondent settling that property in the name of second respondent as per order dated 31.8.1984 is illegal and for a direction to second respondent to settle the property in the name of the appellant. In O.S.407/1985 it was contended that the plaint schedule properties were originally outstanding in the possession of Mallan Kochappi, father of appellant under Ext.A3 and it was originally outstanding in the possession of the mortgagee under Ext.A20 mortgage of 1098. It was contended that after the partition, in the mortgagor tarwad,

those properties were allotted to the share of Lekshmi Pillai Karthiyani Pillai and she assigned it in favour of her children Viswanathan Nair, Ravindran Nair, Sukumaran Nair and Ramesan Nair as per document No.2399/1962 and under Exts.A4 and A5 assignment deeds appellant obtained one half right of equity of redemption and subsequently Mallan Kochappi executed Ext.A6 settlement deed in 1120 whereunder his properties were divided and settled in the name of the different children and as C schedule appellant obtained 50 cents on the northern portion and 37 ½ cents on the southern portion and thus appellant has title to the plaint C schedule property and respondents have no manner of right or possession over the same and second respondent Assistant Director, Re-survey illegally settled the property in the name of the third respondent and third respondent had no right over the property and therefore appellant is entitled to get declaration of title to the property. Respondents in the written statement in the both

suits contended that disputed 50 cents of property is the property of Sasthamkovil temple which was in existence for the last several centuries and appellant has no right, title or possession of the property and therefore the suits are to be dismissed.

2. Learned Munsiff tried both the suits jointly. On the evidence of Pws. 1 to 3, Dws.1 to 3, Exts.A1 to A20, Exts.B1 to B5 and C1 to C3 trial court dismissed both the suits holding that appellant did not establish his title or possession to the disputed 50 cents of the property which was marked as plot EFGHIJKLMN in Ext.C3 plan. Appellant challenged the decree and judgment before Sub Court, Thiruvananthapuram in A.S.120/1987 and A.S.126/1987 respectively. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed both the appeals. The decree and judgment are challenged in these second appeals.

3. S.A.916/1994 is filed challenging the

concurrent decree and judgment in O.S.407/1985 and S.A.917/1994 against the concurrent judgment in O.S.581/1983. The appeals were admitted formulating the following substantial questions of law.

1. Was the court below correct in holding that Deity was a necessary party to the suit.

2. Was the court below correct in dismissing the suit merely on the ground that plaintiff has not proved his title to the entire 3 acres 92 cents in survey No.173/2D.

3. Are not the documents produced by the plaintiff sufficient to indicate plaintiff's title to the property.

4. On the facts and circumstances of the case, was the courts below justified in holding that the Sasthamkovil temple is situated in the plaint schedule property.

4. Learned counsel appearing for appellant and respondents were heard.

5. Learned counsel appearing for appellant

argued that courts below did not properly appreciate the evidence and on the evidence, it should have been found that appellant has title to the plaint schedule property and the temple noted by the Commissioner was put up by the respondents after the institution of O.S.581/1983. It was argued that Ext.C1 report submitted by the Commissioner shows that the temple was constructed only two or three days prior to the date of his inspection and therefore courts below should have found that no temple was in existence as contended by respondents the plaint schedule property. It was argued that the temple which was in existence was to the north of the thodu and not within the plaint schedule property.

6. Learned counsel appearing for respondents argued that courts below rightly found that appellant has no title to the plaint schedule property. It was argued that under Ext.A6 partition deed, properties were divided considering the total extent of the property as 3 acres 72

cents and the sister of the appellant had filed O.S.575/1967 and Ext.A11 judgment of that suit shows that that the said suit was dismissed and Exts.B3 certified copy of the report and Ext.B4 certified copy of the plan submitted in that suit establish that even in 1967 the disputed temple was in existence in the plaint schedule property and therefore case of the appellant that temple was put up after the institution of O.S.581/1983 is not correct. Learned counsel also argued that if property which was available to be partitioned as the property of Kochappi was having only 3 acres 72 cents and not 3.94 acres as claimed and so the disputed 50 cents will not form part of that property and the attempt of the appellant is to grab the temple property and though it was contended that as per a partition deed of 1954 in the family of the mortgagor, it was allotted to the share of Lekshmi Pillai, the partition deed was not produced and eventhough under Exts.A4 and A5 the right of equity of redemption over one half right

over the property was claimed by appellant, document No.2399/1962 whereunder the assignor claimed to have obtained the right was not produced and in such circumstance, it can only be held that appellant has no title to the disputed property and therefore appellant is not entitled to any of the reliefs sought for. It was argued that the substantial questions of law as formulated on the facts and circumstances of the case, do not arise for consideration.

7. Appellant is claiming title to the plaint schedule property in O.S.581/1983 which is the plaint C schedule property in O.S.407/1985, on the basis of Ext.A6 partition deed as well as Exts.A4 and A5 the assignment deeds whereunder one half right of equity of redemption of the property was claimed. As rightly argued by learned counsel appearing for respondents, appellant did not produce the partition deed in the family of the mortgagor whereunder it was claimed that plaint schedule property was allotted to the share of

Lekshmi Pillai. So also, though under Exts.A4 and A5 the right of equity of redemption was purchased from four sons of Lekshmi Pillai, claiming that they obtained the right as per sale deed No.2399/1962 executed by Lekshmi Pillai in their favour, that document was also not produced. Without producing the partition deed as well as the assignment deed and establishing that his assignors under Exts.A4 and A5 have title to the plaint schedule property, appellant is not entitled to claim title to the plaint schedule property under Exts.A4 and A5. Under Ext.A6 partition deed, appellant was allotted C schedule property therein . Ext.A6 shows that under the said settlement deed, styled as partition deed, Kolachira Kizhakkumkara purayidom was divided into seven plots and the northern 50 cents was allotted to the appellant as C schedule and its southern 50 cents was allotted as F shcedule and the remaining four plots which lies respectively to the south of the another having an extent of 50 cents each,

were allotted under schedule G, D,B and E and southern most 37 ½ cents was set apart as A schedule to Kochappi and his wife. Similarly the western Kolachira Kizhakkumkara Purayidom was divided into two plots of 57 ½ cents and northern plot was allotted as F schedule and the southern 57 ½ cents as C schedule to the appellant. It also shows that in between the eastern Kolachira Kizhakkumkara Purayidom and the western Kolachira Kizhakkumkara Purayidom, there is thakidi purayidom which was also divided into separate plots of 11 cents and the southern most 11 cents each was allotted to the appellant as C schedule. As rightly argued by learned counsel appearing for respondents, when under Ext.A6 Kolachira Kizhakkumkara Purayidom was divided into separate plots as having total extent of 3 acres 72 cents, appellant contended that it is having an extent of 3 acres 94 cents, on the basis of settlement register. But Ext.A11 judgment in O.S.575/1967 shows that when the Commissioner identified the

property in that suit, the total extent was found to be only 3 acres 37 ½ cents. In the light of this evidence, the question is whether appellant has established his title to the disputed property.

8. In Ext.C3 plan Commissioner has identified the total plot, which is claimed to be having an extent of 3.94 acres. It is plot ABCDEFGHIJKLMNO, but having an extent of only 3 acres 73 cents. The disputed plot having an extent of 50 cents was marked as plot EFGHIJKLMN. Ext.B4 plan in O.S.575/1967 shows that temple was marked in the said disputed plot. The evidence do not establish that the disputed plot forms part of the property allotted to the appellant under Ext.A6 partition deed or is a part of the property obtained by Kochappi. As rightly pointed out by learned counsel appearing for respondents Ext.A20 shows that the property mortgaged thereunder was outstanding in the possession of third party even at the time when Ext.A20 mortgage was created.

There is no evidence to prove that possession of that property was regained by the mortgagee under Ext.A220. It is on the basis of the entire evidence, courts below found that appellant did not establish his title to the disputed plaint shcedule property. On evaluating the evidence, I do not find any reason to interfere with the findings of the courts below, which was in turn taken on the basis of the evidence on record. When Ext.B4 itself establishes that even in 1967 a temple was in existence case of the appellant that it was put up by respondents only in 1983 cannot be accepted. In the light of the evidence, the substantial questions formulated, in fact do not arise for consideration. I find no merit in the appeals. Appeals are dismissed but without costs.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.916 & 917 /94

JUDGMENT

4th SEPTEMBER,2007